

# ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA08-156

WHIRLPOOL CORPORATION,  
Employer; HELMSMAN  
MANAGEMENT SERVICES, INC.  
APPELLANTS

V.

NELSON HEDGES

APPELLEE

**Opinion Delivered** OCTOBER 1, 2008

APPEAL FROM THE WORKERS'  
COMPENSATION COMMISSION

[NO. F013563]

AFFIRMED

**ROBERT J. GLADWIN, Judge**

Appellants Whirlpool Corporation and Helmsman Management Services appeal the November 21, 2007 opinion of the Arkansas Workers' Compensation Commission, which found appellee Nelson Hedges was entitled to additional medical treatment. The issue presented is whether the Commission's decision was supported by substantial evidence. We affirm.

*Statement of Facts*

Hedges injured his back on August 15, 2000, while working for Whirlpool. After being treated by Dr. Anthony Capocelli, a neurosurgeon, Hedges underwent surgery on his back on December 6, 2001. Hedges was discharged from Capocelli's care by report of July 19, 2002, with permanent restrictions and a permanent impairment rating of thirteen percent to the body as a whole, which was paid by appellants. Hedges returned to work part time,

working four hours a day and attending physical therapy four hours a day. Eventually, he returned to work full time and is currently working for Whirlpool. His current job requires that he stand eight hours a day.

Hedges claims that he has continued to have low-back pain and pain into his left leg. He describes it as a burning, tingling sensation. He testified that his foot begins to hurt so badly that he has to stomp it to keep it from feeling like it is falling asleep. He says this pain is constant, and he takes Aleve at work but takes his prescription pain medications at home. He claims that his pain is increasing and it is getting more difficult for him to sleep, noting that he sleeps only two hours at a time. He explained that the longer he lies down or sits he begins to hurt more. He testified that the pain medication prescribed for him does not completely relieve his pain but makes it tolerable. He testified that his back surgery did help in that he felt better and could get around better. However, he stated that over time, his pain has increased.

On September 12, 2003, Hedges returned to Dr. Capocelli, who then referred Hedges to Dr. Swicegood for a series of lumbar-spine injections and for pain management. Hedges testified that Dr. Swicegood worked with him for a year or more and gave him all kinds of injections. These injections helped for a day or two but then his pain increased. By report of September 6, 2004, Dr. Swicegood suggested consideration of spinal-cord stimulation.

Dr. Capocelli pronounced Hedges an excellent candidate for spinal-cord stimulation after a lumbar myelogram and a follow-up CT scan were performed. Dr. Johnny K. Smelz reported on December 2, 2005, that he recommended against spinal-cord stimulation, concluding it was not reasonable, necessary, or medically justified. Dr. J. Michael Standefer,

a neurosurgeon, examined Hedges on March 24, 2006, and reported that he did not believe spinal-cord stimulation was appropriate for Hedges.

Dr. Robert Barth, M.D. and Ph.D., performed a forensic review and evaluation at appellants' request and reported on April 22, 2007, that he recommended against spinal-cord stimulation and against the trial form of stimulation. Further, Dr. Barth recommended Hedges complete a battery of psychological testing before any stimulation of the spinal cord is performed.

A hearing was held February 22, 2007, and the administrative law judge issued her decision on May 9, 2007, that the spinal-cord stimulator, or at least the preliminary trial recommended by Dr. Capocelli, was medically reasonable and necessary. Appellants appealed to the full Commission, which affirmed and adopted the ALJ's decision by opinion dated November 21, 2007. Appellants filed their notice of appeal on December 17, 2007, and this appeal timely followed.

#### *Standard of Review*

Typically, on appeal to this court, we review only the decision of the Commission, not that of the ALJ. *Daniels v. Affiliated Foods S. W.*, 70 Ark. App. 319, 17 S.W.3d 817 (2000). In this case, the Commission affirmed and adopted the ALJ's opinion as its own, which it is permitted to do under Arkansas law. *See Death & Perm. Total Disab. Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003). Moreover, in so doing, the Commission makes the ALJ's findings and conclusions the findings and conclusions of the Commission. *See Id.* Therefore, for purposes of our review, we consider both the ALJ's order and the Commission's majority order.

Under Arkansas law, the employer must “promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine ... as may be reasonably necessary in connection with the injury received by the employee.” Ark. Code Ann. § 11-9-508(a) (Supp. 2007). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary treatment under the statute is a question of fact for the Commission. *Hamilton v. Gregory Trucking*, 90 Ark. App. 248, 205 S.W.3d 181 (2005).

When reviewing the sufficiency of the evidence to support a decision of the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission’s findings and will affirm if the Commission’s decision is supported by substantial evidence. *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission’s conclusion, we must affirm its decision. *Stafford v. Arkmo Lumber Co.*, 54 Ark. App. 286, 925 S.W.2d 170 (1996). The Commission has the duty of weighing medical evidence, and the resolution of conflicting evidence is a question of fact for the Commission. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). It is well settled that the Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. *Oak Grove Lumber Co. v. Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998).

### *Discussion*

Appellants maintain that the Commission erred in finding that spinal-cord stimulation is reasonable and necessary medical treatment for the compensable injury Hedges suffered on August 15, 2000. They argue that reasonable minds could not reach the same conclusion as that of the Commission when confronted with the evidence. They contend the Commission ignored the opinions of Dr. Smelz, Dr. Standefer, and Dr. Barth and relied solely on Dr. Capocelli, who cited no medical or scientific authority in support of his proposal for spinal-cord stimulation. The ALJ's opinion of September 20, 2007, which was adopted by the Commission, states:

Although I am sure each of these gentlemen, Dr. Smelz, Dr. Standefer, and Dr. Barth are all well intended, I do not find that their opinion should carry the same weight as that of the claimant's long term treating physician, Dr. Capocelli. Dr. Capocelli set forth in his deposition that there were objective findings of nerve root scarring which was nonsurgical and in his desire to keep this claimant working and alleviate his pain level, he was recommending a spinal cord stimulator or at least to test the claimant to see if he would be a candidate for such a device.

Appellants argue that Dr. Capocelli does not have an "opinion" on whether spinal-cord stimulation will benefit appellee because he does not list the pros and cons of the treatment. They further contend that because Dr. Capocelli and Dr. Swicegood tried "everything" to reduce Hedges's pain, stimulation appears to be a last-ditch effort. They claim that Dr. Capocelli does not express an opinion on the reasonableness and necessity of stimulation, but states an unsupported hope or guess that it might work.

They contrast Dr. Capocelli's recommendation with the opinions of Dr. Smelz, Dr. Standefer, and Dr. Barth. Dr. Smelz of the Department of Veterans Affairs opines that spinal-cord stimulation is not needed and is a bad treatment choice. Dr. Standefer states in his report

that spinal-cord stimulation is not needed and not appropriate for Hedges. Finally, Dr. Barth, most heavily relied upon by appellants, is also of the opinion a spinal-cord stimulator is not reasonable or necessary medical treatment.

It is Dr. Barth's opinion that spinal-cord stimulation as a general rule is a form of over-treatment and should not be used to treat chronic pain. Dr. Barth also noted that even should Hedges have a successful trial with the spinal-cord stimulation, that is no indication the implantation would work. Dr. Barth indicates the following factors that he considered in making his recommendation: Hedges's chronic low-back pain; an unexplained prescription of anti-anxiety medication; a significant past alcohol history; the failure to exhaust all other treatment options; the unusually extreme pain-severity ratings; the absence of a psychological evaluation; the indications of a somatoform disorder; his unresolved secondary pain issues; and his abnormal-illness behavior in the form of "chronic-pain syndrome." Dr. Barth is of the opinion that these factors should be considered along with a review of Hedges's entire medical history and psychological testing, which should include the MMPI-2 and the McGill Pain Questionnaire. Appellants argue that in the face of contrary evidence, the ALJ and Commission improperly gave Dr. Capocelli's opinion more weight. They maintain that, at the least, this case should be remanded to the Commission to require Hedges's thorough psychological evaluation and trial testing, as recommended by Dr. Barth, to be considered by the Commission.

Hedges argues that, based upon the evidence, he continues to work and is seeking relief so that he can keep working. Dr. Capocelli's deposition testimony was that Hedges is highly motivated and has been from the beginning. Hedges points out that Dr. Standefer

agrees that some medical treatment is necessary, even though he does not think it is the spinal-cord stimulator. Finally, Dr. Barth's report reveals that he does not think that spinal-cord stimulators are ever appropriate. Hedges contends that appellants urge this court to adopt the position that spinal-cord stimulators are never reasonably necessary medical treatment in regard to chronic-back pain. He argues that such a determination would be inconsistent with the Commission's knowledge regarding the efficacy of spinal-cord stimulators. We agree.

Dr. Capocelli testified that he has had experience with dorsal-column stimulators and has placed several. He also testified that before determining whether a stimulator should actually be implanted, he would do a trial stimulator and Hedges would undergo a psychological evaluation. Finally, he stated that he would not recommend a permanent implant unless he could establish that it would have efficacy. This testimony coupled with Dr. Capocelli's formal training as a neurosurgeon places Dr. Capocelli's opinion beyond speculation. Therefore, there is substantial evidence to support the Commission's findings.

Affirmed.

ROBBINS and BIRD, JJ., agree.